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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, DOING BUSINESS AS WALES TRUCKING COMPANY; L. C. JONES TRUCKING COMPANY, INCORPORATED, PARKHILL TRUCK COMPANY, AND H. J. JEFFRIES TRUCK LINE,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

LEONARD E. ROACH,
T. S. CHRISTOPHER,
M. WARD BAILEY,
Counsel for Appellants.

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JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States the Appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal in this cause:

1. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment here complained of is conferred by 28 U.S.C. 1253, 2101(b) and 2325.

2. The judgment of the District Court sought to be reviewed was entered on the 2nd day of January, 1953, and the application for appeal was filed on the 11th day of February, 1953, and is presented to the District Court herewith to-wit, on the 11th day of February, 1953.

This suit was brought to set aside certain orders of the Interstate Commerce Commission dated May 7, 1952 under Docket No. MC 1554 (Sub. 7) and seventeen (17) other applications and Docket No. MC 108944 (Sub. 7) and for permanent injunction to enjoin issuance of certificates of convenience and necessity to nineteen motor carriers. The reasons assigned by Complainants to support their charge of invalidity of said orders were: (a) the disqualification of the Examiner under the Administrative Procedure Act that objection having been raised before and overruled by said Commission, which fact makes particularly pertinent and applicable Commission General Order, "Organization and Assignment of Work", or amended (12 F. R. 3228), paragraph 0.4a, eliminating any question of waiver and requiring application of the mandatory requirements of Sections 7, 8 and 10(e) Administrative Procedure Act; (b) that the Commission exceeded its statutory authority; (c) that said Commission failed to make basic findings of fact to support its ultimate conclusion; (d) the prejudicial action of the Examiner and of the Commission in consolidating numerous applications for hearing upon single records; (e)

the comingling of the evidence in different records of evidence and the consideration thereof as if applicable to each separate application contrary to Section 7(d) of the Administrative Procedure Act and contrary to judicial concept of fair hearing; (f) the orders are not supported by substantial evidence, including the novel question arising as to what constitutes substantial evidence in the application of that rule to eighteen or nineteen proceedings when disposed of in one order; (g) denial of the right of cross examination by the erroneous admission by the Examiner of Exhibit 50 particularly where the order of the Commission in context shows upon its face that in the entry of said orders that said Commission relied substantially, if not entirely, upon matters contained in said Exhibit, and (h) that particularly in view of the speculative character of the evidence and the mere forecast of the Commission in a field wherein it was not exercising its expertise that the record was stale, requiring the application of the doctrine of the *Atcheson, Topeka and Santa Fe Railroad* case, 284 U. S. 241, petition having been filed seeking such rehearing and offering to introduce evidence prior to final determination by said Commission.

All Respondents answered. The cause was heard on its merits before a specially constituted District Court, after which said Court rendered an opinion, copy of which is appended hereto. Judgment was entered for the Respondents dismissing Complainants' bill.

The jurisdiction of the District Court is sustained under 49 U. S. C. 2321, *et seq.*

Respectfully submitted,

LEONARD E. ROACH,
T. S. CHRISTOPHER,
M. WARD BAILEY,
Counsel for Appellants.

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APPENDIX "A"

SUIT TO SET ASIDE, ANNUL, AND CANCEL CERTAIN ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Leonard E. Roach, Oklahoma City, Oklahoma; T. S. Christopher, Fort Worth, Texas, for Complainants.

Isaac K. Hay and Edward M. Reidy, Washington, D. C., for Interstate Commerce Commission.

Joe E. Shaw, Houston, Texas, for Newsom Truck Line, Inc.

Ralph Currie, Dallas, Texas; E. H. Muse, Jr., and Morgan Nesbit, Austin, Texas, for thirteen of the Truck Lines.

Newell A. Clapp; James E. Kilday, and E. Riggs McConnell, Special Assistant Attorneys General, Washington, D. C.

Callaway & Reed, and Rollo E. Kidwell, Dallas, Texas, for five of the defendant trucking companies.

Before Joseph C. Hutcheson, Jr., Chief Judge, Circuit Court of Appeals, William H. Atwell, Chief Judge, District Court, and T. Whitfield Davidson, District Judge

ATWELL, *Chief District Judge:*

This suit was filed July 2, 1952.

There are four complainant trucking companies against twenty-two respondents, two of which respondents are the United States, and the Interstate Commerce Commission. The respondents, other than the United States and the Interstate Commerce Commission, are alleged to reside in the Dallas division of the Northern District; Oklahoma City, Oklahoma; Tulsa, Oklahoma; Odessa, Texas; Kilgore, Texas; Big Spring, Texas; Wichita Falls, Texas; Fort Worth, Texas; Houston, Texas; Gainesville, and Burkburnett, Texas.

The complainants allege that the respondents held certificates issued by the Interstate Commerce Commission, authorizing operations in interstate and foreign commerce in varying territories, but usually to serve in the states of Texas, Oklahoma, New Mexico, and Kansas, though some

of them held authority to operate in such other states as Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, and other states. That in the latter part of 1948 the respondent carriers filed applications seeking authority to operate also to points and places in the states of Colorado, Wyoming, Utah, Arizona, Idaho, Montana, and Nebraska, and also to operate from and between points in the states of Colorado, Wyoming, Utah, Arizona, Idaho, Montana, and Nebraska.

The commodities which they sought authority to transport were, (A) Machinery, equipment, materials and supplies used in, or, in connection with the discovery development, production, refining, manufacture, processing, storage, transmission, and distribution of natural gas and petroleum and their products and by-products. (b) Machinery, equipment, materials, and supplies used in, or, in connection with the construction, operation, repair, servicing, maintenance, and dismantling and picking up thereof.

Hearings were had upon said applications in April, 1949, in Dallas, to June 20, 1949, when concluded, at Denver, by Clarence E. Simmons, as the Examiner.

That all the applications of the defendant motor carriers for these additional certificates, were separate, and the Examiner, for the purpose of convenience and conserving time and work, consolidated the applications insofar as the hearing was concerned. That the testimony would be taken for, or, against either application, and would be applicable to such other applications as were pertinent. That the testimony of each witness would be specifically directed to the application, or, applications, which he supports.

Twelve of the applications were heard on such consolidated record, and, subsequently, six additional applications were heard on a consolidated record.

The respondent Newsom Truck Line application was heard separately. Testimony in the Newsom case was taken at Houston on May 2, 1949, and concluded at Denver on June 28, 1949.

On March 27, 1950, the Examiner denied the applications of all the respondents.

The Examiner also denied the application of the Norris Motor Lines.

Thereafter, Division No. 5 consolidated all of the eighteen applications, and issued one report covering all eighteen applications and authorized the issuance of the certificate to each of the eighteen applicants. This report was dated June 11, 1951. On the same date, the Newsom Truck Line was also granted a certificate.

It reported that such certificates were issued on the increase in oil field activity in the states heretofore mentioned.

At the time of such issuance, the complainant Wales was authorized to transport the commodities described, between points in Kansas, Oklahoma and Texas, and between points in Illinois and Missouri, and points in Colorado, Kansas, Nebraska, Oklahoma, and Texas, and between points in Kansas, South Dakota, North Dakota, Wyoming, Montana, Oklahoma, Colorado, Illinois, Indiana, Kentucky, Missouri, Nebraska, and Texas, as well as for heavy machinery and other commodities which required the use of special equipment from points in Colorado, Illinois, Kansas, Missouri, Nebraska, and Oklahoma, as well as commodities, which, because of size, or, weight, required special equipment and related parts, between points in Kansas and points in North Dakota, South Dakota, Montana, Wyoming, Utah, New Mexico, and Texas.

Complainant Jones, Inc., or its predecessor, L. C. Jones, held certificates authorizing the transportation of the commodities described, between points in Colorado, Kansas, Oklahoma, Louisiana, New Mexico, Texas, and Wyoming, and between points in Montana, Utah, and between points in Kansas, Oklahoma, and Texas, being machinery and machinery parts, other than oil field machinery and parts, which, because of size, or, weight, required special handling, or, rigging, from points in Oklahoma and Texas, to points in Arkansas, Colorado, Kansas, and Texas.

Complainant Park Hill Trucking Company held certificates authorizing transportation described above, in paragraphs (a) and (b) between points in Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, Texas, and Wyoming. It also was authorized to transport pipe, pipeline material, machinery and equipment incidental to, and, used in connection with the construction, repairing, or, dis-

mantling, pipelines, between points in Oklahoma, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Complainant Jeffries Trucking Company, Inc., held authority on substantial portions of the service which applicants proposed in case their applications are granted.

After the granting of the certificates to the defendant motor carriers, the entire Commission overruled petitions for rehearing, in which the complainants alleged that there was no present need for the services proposed by the respondents and that the evidence submitted to the Examiner was of a highly speculative character.

They also alleged that they were entirely capable of rendering all services required as motor carriers in the involved territory.

The complainants also allege that the authority of the Interstate Commerce Commission in issuing licenses to the respondents was in violation of statutory authority, arbitrary, unreasonable, unjust, and without support of evidence, and contravenes the National Transportation policy.

They also attack the hearings as being null and void, and that large scale development is highly speculative, and that public convenience and necessity does not require the anticipated service ordered and allowed by the Commission.

Further, that the applications of Farmer & Company and Newsom Truck Lines, Inc., made use of the evidence that was offered in other respondents' hearings.

Immediate and irreparable injury and damage is alleged without a reasonably adequate remedy at law.

Permanent injunction setting aside and cancelling the orders complained of is prayed.

Voluminous testimony, covering thousands of pages, was introduced in the hearing before us, and such testimony discloses that there is ample testimony to support the findings of the Commission in overuling the recommendation of the Examiner, and in granting the certificates sought. Such testimony included persons entirely familiar with the incoming oil fields in the mentioned states, and with the

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exception of one or two of such states, and with the vast number of trucks that are required to carry heavy oil drilling and oil developing machinery. Also covering leases that had been made in these particular territories, which, of course, carry expiration dates and necessity for development without delay.

We must conclude that there is ample testimony to support the findings of the Commission. We have no authority to look into the testimony, save for the purpose of discovery whether there is testimony which supports the findings.

As to the attack which is made upon the Examiner, it will be noted that the Examiner found for the complainants, and against the applicants. That there was no attack upon the appointment of the Examiner, nor upon his fairness, nor judicial demeanor. In truth, the record contains compliments that were passed upon him by the Complainants because of his accuracy and fairness.

Thus, evidencing, as the record discloses, their complete satisfaction with him, and they may not now successfully attack the hearings which he held, the manner, the testimony which he heard, and the highly sensible method pursued by him in hearing and preserving the testimony offered by all sides.

The Tucker case, originally reported in 100 F. (s) 432, was reversed by the United States Supreme Court, 344 U. S. 33, and the complainants would be estopped now to raise such question, even were there any ground.

We do not understand that the words, "convenience," and "necessity," are to be bounded and limited by any authority, save and except Interstate Commerce Commission. Nor do we understand that it is the overall purpose of the Transportation Act which authorized more carriers in Interstate Commerce was intended to build a monopoly. No one can study the great oil sands which come down from Montana all through the states involved here, into Colorado, and on down through Texas, without realizing that the development which is now taking place there, and which is being richly rewarded by paying wells, can be expected to be satisfied and sufficiently supplied by motor carriers as now licensed. That very question was a controversial one

and it had been settled by the satisfactory amount of evidence which was considered by the Commission.

Able briefs, with a complete exhaustion of applicable decisions, have been filed by both parties, but there are but two militant attacks. Those relate to the consolidation of the hearings by the Examiner, which, as already stated, were all right so long as the Examiner was recommending against the granting. That attitude may not be taken by a litigant after the work has been done in a manner that was quite acceptable to the litigant and resulted in compliments.

The practice of consolidating has been approved in Central Transfer Co., v. Term. R. R. Co., 288 U. S. 469; Trade Commission v. Cement Institute, 333 U. S. 683; Greyhound Corp. et al., 57 M.C.C. 123; Meeker v. Lehigh Valley, 236 U. S. 434, and Akron, C. & Y. R. Co. v. United States, 22 F. (2d) 199. Such eliminates costly duplication in the presentation of evidence and affords opportunity of more expeditious disposition of proceeding; T. E. Mercer, et al.—Oil Field Commodities, 46 M.C.C. 845. In that case thirty-one applications were before the Commission and were heard on a consolidated record. U. S. et. al. v. Peirse Auto Freight Lines, 327 U. S. 515.

Protestation was made at that time, charging that it was arbitrary, capricious, and prejudicial, but the Commission said, "It is the duty of the joint Boards and Examiners to develop such procedure in cases before the Commission as will complete the taking of evidence with expedition and economy, without prejudice to the rights of the parties. The respective joint Board members were present at, and actively participated in the proceeding, and in the disposition of the applications assigned them. A very large portion of the evidence adduced applies equally to all of the applications. All parties were afforded the opportunity of a full direct or cross examination of the witnesses. There is no provision in the Interstate Commerce Act which prohibits the hearing of related joint Board and Examiner cases upon a consolidated record. In the circumstances, it does not appear that any of the parties were, under the procedure adopted, deprived of any substantial rights in the proceedings." Language that is definitely appropriate here.

The admission into evidence of Exhibit 50 was not in our opinion prejudicial error, both because it was prepared and written as quasi-public document in the oil industry, antelitem motem, and because, in proceedings before administrative bodies, strict rules of evidence are not absolutely controlling and will form no basis for reversal in the absence of the document and the comments of the commission with respect to it, we think it clear that its admission constitutes no basis for reversal.

The only other point that remains, has, likewise, been mentioned, and it relates to the quantum supporting the action of the Commission and the granting of the certificates.

The Commission, through the application of its expert judgment and experience in, and knowledge of, interstate transportation matters, is the final arbiter upon whether or not additional motor carrier service is required. Public transportation is not something that can belong to an applicant. It is established and determined by proof of conditions which exist in the territory to be served.

The testimony showing the trend of new development and exploration in oil fields, with their extensive acreage and outstanding leases, and large-scale exploratory operations together with the great production, furnishes a substantial foundation for the judgment of the Commission. United States v. Carolina Freight Carriers, 315 U. S. 475; Warehouse Co. v. United States, et al., 321 U. S. 67; Capitol Transit Co. v. United States et al., 97 F. (s) 614; Long Transportation Corp. et al. v. United States, et al., 75 F. (s) 918; Interstate Commerce Commission, et al. v. Parker, et al., 326 U. S. 60.

It follows that the complaint must be dismissed. Suitable order to that effect may be prepared and presented by counsel.

(S.) Joseph C. Hutcheson, Jr.,
United States Circuit Judge;
(S.) William H. Atwell,
United States District Judge;
(S.) T. Whitfield Davidson,
United States District Judge.

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We trust that this supplemental statement is not out of order nor improper, although we find no rule authorizing it, neither do we find anything in the rules preventing it.

This being a direct appeal the motions to affirm relate exclusively to the substantiality of the questions presented.

When it takes the private litigants sixteen pages and the government an additional six pages to undertake a showing that the questions raised are not substantial it is a foregone conclusion that they are substantial.

In connection with the question of qualification of the Examiner under the Administrative Procedure Act the Trial Court makes the inept remark that:

> "The *Tucker case*, originally reported in 100 F. (5) 432, was reversed by the United States Supreme Court, 344 U. S. 33, and the Complainants would be estopped now to raise such question, even were there any grounds".

There might be a question of stare decisis had the question been raised before the Commission in the *Tucker* case as it was raised in the case at Bar and specifically overruled. And it might be stare decisis had the question of the Commission's general order, "Organization and Assignment of Work", hereinafter referred to been raised and considered, but neither was presented in the *Tucker* case.

The Government and the Interstate Commerce Commission admit in their joint motion to affirm that in the *Tucker* case "The precise issue was not specifically decided".

This first and very important question relates to the disqualification of the Examiner under the Administrative Procedure Act, there being no question of waiver, the question having been raised before the Commission (and by it specifically overruled) and at the proper time under both the per curiam opinion in *W. J. Dillner Transfer Company v. United States*, 100 Fed. Sup. 506, affirmed per curiam November 10, 1952, — U. S. —, 97 L. ed. (advance page 120) and more particularly under the Commission's general order "Organization and Assignment of Work" as amended (12 F. R. 3228, Paragraph 0.4a). In neither the *Tucker Truck Lines* case, 344 U. S. 33, nor in the *Dillner*

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case, *supra*, was the question of the appropriate time to raise the question of disqualification of the Examiner under the Administrative Procedure Act in light of the Commission's aforesaid General Order raised nor considered by the Court. Of course the question was not raised in either of those cases before the Commission. Here it was raised and specifically ruled on.

The facts are that the Interstate Commerce Commission is caught in its own trap by reason of its bold and brazen attempt on May 12, 1947 to avoid and evade the mandatory requirements of the Administrative Procedure Act by its entry of the aforesaid General Order "Organization and Assignment of Work" by adding Section 0.4a in which it made no effort to cover up its obvious intent but specifically referred to the Administrative Procedure Act and knowing full well that Examiners were required in procedures such as here involved provided in the General Order that "all proceedings of the character in which, by provisions of the Administrative Procedure Act (60 Statute 237), a hearing is required to be conducted in conformity with Section 7 and a decision to be made as provided in Section 8 of the Act, *shall be and are reserved to the Commission for initial decision.*"

In other words, the General Order provided as it could do under the provisions of the Administrative Procedure Act that the record, after the testimony was taken by an examiner, was considered certified to the full Commission, and the Commission would make the *initial* and only decision which the Interstate Commerce Commission would ever make in such proceedings. The proposed report of the Examiner in this case was not and under said order could not be the initial decision and under the General Order it made no difference what was presented to the Examiner other than for the Examiner to take the evidence. As soon as he had taken the evidence it was then before the Com-

mission for the Commission to make the initial and only decision. Any other step that was taken was just like the act of the Examiner as for instance the report and order of Division 5 and meant nothing whatsoever under the Commission's General Order referred to because the Commission had stripped all authority away from everyone except the full Commission to render the initial decision.

Whatever the examiner did in these proceedings and whatever Division 5 did in these proceedings were nothing more than suggestions to the Commission as to what the Commission should do when the Commission made the "initial decision" and the General Order makes this clear because the General Order provides that as an *aid* to the full Commission in the performance of its work under the reservations that "for such purpose of initial decisions" matters so reserved to the full Commission "may be assigned to a division, individual Commissioner or board as provided in Section 17 of the Interstate Commerce Act (49 U. S. C. 17), by the General Order of the Commission as to assignment of work, business or functions" and then the General Order goes on to provide that "for the purpose of *such initial decision* the record in the proceeding *so reserved* shall be considered as certified to the Commission *for initial decisions* when received by the Secretary of the Commission for filing in the docket".

There was not therefore in this proceeding even so much as an initial decision until the Commission acted on May 7, 1952. Under the Commission's reservations there had been some prior recommendation to the full Commission as to what its *initial decision* should be and that is all. The initial decision by the full Commission on May 7, 1952 made utterly no findings of fact, no conclusions of law and is wholly unintelligible and decides nothing except as reference may be made to a recommendation of Division 5 to the Commission back on June 11, 1951 which, under the Com-

mission's General Order, meant nothing whatsoever except a recommendation for any authority which Division 5 of the Commission might have had, had been stripped from it by the aforesaid General Order.

The Commission was simply undertaking to operate entirely outside of and beyond the pale of the Administrative Procedure Act. When the question of qualification of its Examiners was raised before the Commission *there had never even been an initial decision* in the case and it was raised in proper time. It seems to us that it is a certainty that that question was raised at the proper time or else possibly it may have to be said that there has in fact been no initial decision on the applications at all because the Commission's decision of May 7, 1952 is certainly the initial decision under the Commission's own General Order and the Commission's order of May 7, 1952 does nothing at all, it authorized nothing at all, it finds no facts, it contains no conclusions of law, it in fact makes no final determination of the applications.

The so-called petitions for reconsideration in which the question of qualification of the examiners was raised were not in any sense true petitions for reconsideration under the Commission's General Order because only the full Commission could consider the applications and make the initial decision. They were simply briefs filed with the full Commission for that Commission's first and the only consideration which the Commission had or has ever given to the applications in the performance of their function of making an initial decision. The use of the words "initial decision" certainly could have no meaning except first decision.

Moreover, it is obvious to us that the Court's decision in the *Tucker Truck Line case, supra* did not mean that the question had to be raised before the examiner. It merely means that it should be raised at some point in the pro-

ceeding before the Commission so that the Commission would have an opportunity to pass upon it. That is certainly the rationale of the decision in spite of the conflict in choice of language used. The question was raised before the *initial decision* by the Commission under its own General Order, if there has in fact been an initial decision, and that is all that is required.

Moreover, if the question had been raised before the Examiner the Examiner would not have passed on it under the Commission's Procedural Rule No. 70, nor under the Order assigning the applications to the Examiner. Neither was it important that it be raised there because the parties had a perfect right to raise the question under the Commission's Procedural Rule No. 101. Of course after the Commission stripped its Examiners and Divisions of all authority, by reserving the initial decision to the full Commission, it had the effect of completely disorganizing the Commission procedure under its Procedural Rules. If, however, it be otherwise then the parties had the perfect right to raise the question at any time before the full Commission acted under its Procedural Rule No. 102, which allows parties to raise practically any question which the parties deem relevant and important and require the Commission to pass upon them.

The question here presented has not been before the Court and the Government admits this. The question is substantial, highly important, and should be by the Court considered.

Commission Exceeded Statutory Authority

A second highly important and substantial question presented is whether or not administrative bodies must act within statutory authority basing their orders upon statutory criteria. We have always thought, and hundreds of

cases have asserted, that administrative bodies must follow carefully and specifically the requirements laid down by Congress to protect the public from administrative absolutism. It is not too much to insist that the statute be followed and such insistence is not a mere search for precision, but an insistence upon a substantial question of right.

To our insistence upon this the Trial Court naively remarked that "we do not understand that the words 'convenience' and 'necessity' are to be bound and limited by any authority save and except the Interstate Commerce Commission." This is administrative absolutism. Section 207, Interstate Commerce Act, Part II (49 U. S. C. A. 307) fixed criteria within which the Commission must act. The National Transportation Policy sets forth further guiding principles. In passage of the Motor Carrier Act of 1935 the criteria for the issuance of new certificates was adopted which had been employed since the Transportation Act of 1920. Such use indicated a continuation of the administrative and judicial interpretation of that language.

In many cases the Commission itself has interpreted this criteria. It has insisted that there must be an affirmative showing that the proposed service is not only required in the convenience of the public proposed to be served, but that it is a necessity on the part of such public; that this latter element includes a showing that the present facilities are inadequate for the transportation of the described commodities between the points involved. The Commission has stated the same criteria differently by insisting that before a new motor carrier service may be authorized that it must be shown that the new operation will serve a useful public purpose, responsive to a public demand or need, that this purpose cannot and will not be served as well by existing carriers and whether it can be served by an applicant in

the new operation proposed without endangering or impairing the operations of existing carriers. This is in keeping with the National Transportation Policy.

Pan American Bus Lines, Common Carrier application, 1 MCC 190; Zephia O'Dell Clark, Common Carrier, 1 MCC 445; George Edmund Jackson, Common Carrier, 7 MCC 656; West Coast Bus Lines, Ltd., Common Carrier, 32 MCC 619; Squaw Transit Company, Common Carrier, 48 MCC 17; Tri-State Transit Company of Louisiana, Inc., 29 MCC 381; Spencer, Extension, 29 MCC 73; Sullivan, Extension, 34 MCC 157; Chief Refrigerated Truck Lines, Inc., 34 MCC 492; Santa Fe T. Co., 41 MCC 731; McCoy Truck Lines, Inc., Extension, 26 MCC 585; McClenden Extension, 26 MCC 590; Inland Motor Freight, Extension, 27 MCC 784; Gulpker Extension, 29 MCC 723; Holland Transportation Co., Inc., 33 MCC 558; Thompson, Extension, 34 MCC 5; Contract Carriers, Inc., 41 MCC 165; Clark Callahan, Inc., 41 MCC 693; Maner, 42 MCC 778.

The Commission in this proceeding violated and completely abandoned the statutory criteria and its own interpretation thereof and set up the determining criteria as being whether or not there was such probability of an increase in oil field activities in the Rocky Mountain States as to justify the granting of authority for the institution of nineteen additional carrier services. Nineteen such additional services were authorized, as the Attorney General and the Interstate Commerce Commission frankly admit, upon the basis of a finding, not by the Commission in making the *initial decision*, but by Division 5 of said Commission in a recommendation to the Commission that there was "an immediate prospect" of a "large scale development program" for the Rocky Mountain Area, that such development would produce demands for transportation service "of the highly specialized nature here considered,"

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which would "greatly exceed" the capacities of existing carriers. This is a complete reversal of both Commission and judicial interpretation of the applicable standards. The Commission was not acting within the statutory criteria, but in violation thereof.

In such findings Division 5 was not exercising its experties as Division 5 frankly admitted saying that "we have no alternative but to rely upon the judgment of persons who are in a position to give the best estimate of the future probabilities". The statement had reference to what Division 5 admitted was highly speculative. As to the probabilities of large scale oil development the Commission of course has no experties in the oil business.

The Commission directly violated Section 210a(a) wherein Congress in furtherance of the National Transportation Policy has provided for such contingencies as an oil boom, by providing for the issuance of temporary certificates for periods of one hundred eighty (180) days, within which permanent authority applications could be determined. The very purpose of Section 210a(a) was to perpetuate administrative and judicial interpretation of the criteria set forth in Section 207, and effectuate the National Transportation Policy. All of this the Commission in this case completely ignored.

Again we assert that it is not too much to insist that the Commission act within statutory criteria rather than degenerate into administrative absolutism.

The question presented is substantial and important. Whether controlling statutory standards have been properly applied are questions which Courts can and do determine. *Florida* v. *United States*, 282 U. S. 194; *Interstate Commerce Commission* v. *N. P. R. Co.*, 216 U. S. 538; *United States* v. *Carolina Freight Carrier Corporation*, 315 U. S. 475; *Eastern Central Motor Carrier Association* v. *United*

States, 321 U. S. 194; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60.

Basic Findings

A third highly important and substantial question involved herein is the refusal of the Court to vacate the orders of the Commission for failure to make basic findings of fact to support its ultimate conclusion.

The Commission's ultimate conclusion was couched only in the language of the statute.

Of course the Commission by its General Order "Organization and Assignment of Work" (12 F. R. 3228) made no findings of fact at all, neither did it arrive at any conclusions at all. See Commission's order of May 7, 1952. Division 5 of the Commission in a recommendation to the Commission in aid of the Commission's issuing the initial order did, as the Attorney General and the Interstate Commerce Commission frankly state, find that there was an immediate prospect of a large scale development program in the oil industry for the Rocky Mountain Area and that such development would produce demands for transportation which would greatly exceed the capacities of existing carriers. It must be remembered, however, that Division 5 had been stripped of all authority to make any kind of an order in these cases, that authority having been specifically reserved to the Commission. Even should the findings be imputed to the Commission and under the General Order referred to the word "imputed" is advisedly used, still the findings are not sufficient.

The Commission and the Court have many times construed and defined the criteria in which the Commission must act in granting certificates of convenience and necessity. That criteria has been shown in connection with the second important question hereinabove discussed. Remem-

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bering that the Commission under its reservation to make the initial decision has made no findings or conclusions, but by imputing the finding of Division 5 to the Commission itself then we point out that the orders under attack utterly fail to make any finding (1) of any inadequacies or deficiencies in existing service; (2) of inefficient or uneconomical operation by existing carriers; (3) of any public demand or need for the proposed service; (4) even if there was any demand whether or not such demand could or would be served as well by existing carriers and (5) even if there was any demand whether it could be served by nineteen (19) additional carriers without endangering or impairing the operations of existing carriers contrary to the public interest and the National Transportation Policy.

Some such findings or their equivalent are essential to support the ultimate conclusion in the language of the statute that present and future public convenience and necessity require the nineteen (19) proposed carrier services. Otherwise the Commission has acted beyond its statutory authority and the order becomes administrative absolutism. Congress has prescribed the statutory standards pursuant to which the applications were to be determined. Congress has also provided for judicial review as an assurance that its policies will be executed. An insistence upon the findings which Congress has made basic and essential to Commission action is no intrusion upon the administrative process. It is nothing more than an insistence upon the observance of those standards which Congress has made prerequisite to the operation of its statutory commands.

As already pointed out the Commission has not applied that criteria. It has made no basic findings within the established criteria from which its ultimate statutory conclusion could be reached. There being no such basic findings the statutory conclusion is entirely insufficient just as found in *Florida* v. *United States*, 282 U. S. 194. See also

United States v. *Carolina Freight Carrier Corporation*, 315 U. S. 475 and many other cases unnecessary to cite.

When the Commission by General Order such as herein pointed to reserves exclusively to itself the function of making the initial decision, stripping its Examiners and Divisions of all such authority and then abandons its statutory duties and makes no order or decision and makes no findings and enters no conclusions but relies upon findings which it undertakes to impute to itself, which findings are within themselves wholly insufficient and lacking in basic essentials to support a conclusion, the question becomes very important and very substantial. If such action of the Commission is not condemned by the Courts, statutory rights will be whittled away and statutory criteria and the National Transportation Policy destroyed.

Consolidation of Proceedings; Consolidation of Separate Records; and Co-Mingling of Evidence

Two additionally important and substantial questions are here presented, first, with reference to the consolidation of twelve (12) and the subsequent consolidation of six (6) applications for hearing on separate records. The Commission itself did not consolidate these numerous applications for hearing. That matter was left to the Examiner. The Examiner on motion when the applications were called for hearing consolidated twelve applications and subsequently consolidated six applications, but in so doing specified that each witness would be required to state which applicant the witness supported.

This was the first highly prejudicial error committed in connection with these many applications and it was over the strenuous protest of the complainants here along with many other carriers opposing the applications.

The applications were not closely related, but on the contrary presented substantially different issues among the

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original twelve applicants heard on one record and the same may be said as to the six heard on another record. It is pointed out that some of the applicants sought to serve in a territory stretching from Florida and Georgia through the length of those southeastern states on through the southwestern states and into the Rocky Mountain States, while others sought only authority from some of the southwestern states to the Rocky Mountain States. The applications ranged over a territory of from 2,000 miles in length and covering many states of the Union, to some 1,000 miles in length covering some but much lesser number of states. At least three of the applicants already had authority to serve in at least four of the so-called Rocky Mountain States. It is obvious that the applications were not and could not be closely related there being such a wide divergence of territory sought, nor could the issues be in any respect the same because the issues were controlled by the territory sought and the varying conditions in the varying territory.

All opposing parties, including the complainants, strenuously objected to this prejudicial action of the Examiner which was subsequently greatly aggravated by the action of Division 5 of the Commission, which action is necessarily imputed to the full Commission, in consolidating all of the applications and considering all of the records and evidence as though a single hearing had been had and a single record made on all applications, and the co-mingling of the evidence in the separate records as though all evidence had been presented in a single record.

In this connection the Trial Court merely said that the practice of consolidating had been approved in *Central Transfer Company* v. *Terminal R. R. Co.*, 288 U. S. 469, *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Greyhound Corporation, et al*, 57 MCC 123; *Meeker* v. *Lehigh Valley*, 236 U. S. 434 and *Akron C & Y R Co.* v.

United States, 22 Fed (2) 199. The cases cited in no respect support the statement.

The Trial Court then said that consolidation eliminates costly duplication in the presentation of evidence and affords opportunity for more expeditious disposition of proceedings. This statement while true is in utter disregard of the sound judicial practice of consolidating cases for trial only where the cases are very closely related with substantially similar issues and where prejudice will not occur to the litigants. The action of consolidation in this case was strictly at the expense of opposing parties including these complainants. It resulted in very great prejudice. For the latter statement of the Trial Court it cites *T. E. Mercer, et al—Oil Field Commodities*, 46 MCC 845. The *Mercer* case is authority with nothing in connection with this contention. In the *Mercer* case there were a large number of applications heard on a consolidated record, but the cases were substantially identical and the issues identical in that nothing was involved in those applications except the formulation of an adequate commodity description. All parties were equally interested in obtaining a commodity description which would permit them to transport such commodities as were necessary to render an all-around and complete service to the oil industry.

In the *Pierce Auto Freight Lines* case, 327 U. S. 515 your Honorable Court only said that there was no objection if the Commission chose to determine the two applications in a single opinion rather than in separate opinions "because they were so closely related in their common features". Their common feature was that each applicant there sought to institute a through service between Portland, Oregon and San Francisco, California, a situation very different from that presented in the case at Bar. In that case your Honorable Court approved that action of the Commission in

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writing one opinion rather than two only "if the single report together with the findings and the evidence was sufficient to sustain *the action taken in each case.*" Your Honorable Court then went on to say that:

> "The principal cause of complaint in these respects is that the Commission did not consider each case exclusively on its own record, but looked into the evidence in both proceedings in forming its judgment. If this is true and if it has resulted in substantial prejudice to the appellees, as might occur, for example, if the Commission were shown prejudicially to have considered evidence bearing on one case which did not affect it and was presented in the other, and the appellees were given no opportunity to meet, the orders, or one of them, would be improperly grounded."

It was highly prejudicial to consider all of the evidence of all witnesses on all of the applications as bearing upon and supporting all of the applications, eighteen or nineteen in number, when none of the witnesses in the proceeding involving the group of six testified in connection with the applications involving the group of twelve. The witnesses involving the group of twelve did not testify on behalf of the applicants in the group of six. Quite a few of the witnesses who testified in connection with the group of twelve, and also the group of six, only supported one of the applicants and some of the witnesses were under the impression that they had to support all of the applications or none and certainly none of the witnesses knew when they supported one or more of the applications that they were supporting eighteen or nineteen applicants for that many new carrier services. Nothing but prejudice could possibly result. Especially when Division 5 treats all of the witnesses as supporting all of the applications.

In such circumstances, and under the Examiner's requirements that each witness would be required to state what

applications the witness supported, your complainants although cross-examining all witnesses in all of the proceedings certainly had no idea, nor could they have had, that the testimony of a witness for the twelve group would be treated as though he was also testifying on behalf of six or seven other carriers, nor that when a witness testified for one or more in the group of six that he was testifying on behalf of twelve other carriers. Having no such thought as that complainants were denied the right of cross-examination with any idea in mind that a witness was supporting eighteen or nineteen applications. Of course it is ridiculous to say that a witness would support eighteen or nineteen applications for that many new carrier services and ever at any time undertake to say that he had a need, present or future, for that many new carriers.

Also bear in mind that the *Pierce Auto Freight Lines* case, which comes nearer to touching the issue here involved than any other decision of your Court, was decided prior to the enactment of the Administrative Procedure Act. When the Commission proceeded in the manner in which it proceeded in this case it directly violated the provisions of Section 7(d) (5 U. S. C. A. 1006 (d)) which requires that the transcript of testimony and exhibits filed in a proceeding "shall constitute the exclusive record for decision". But, as shown, the Interstate Commerce Commission has shown an utter disregard of the Administrative Procedure Act and its requirements and has brazenly undertaken to take itself outside of the provisions of that Act.

Division 5 in a so-called report, imputed to the Commission, says that thirty-seven (37) shippers supported the applications, referring to eighteen of them. This is definitely untrue. In the so-called report, however, the Commission treated each and every witness as though he was supporting each and every application irrespective of the

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record in which his testimony appeared and irrespective of whether the witness said that he was supporting merely one or more of the applications, or whether he said he was under the impression he had to support all or none. It should be obvious that no witness was supporting eighteen or nineteen applications.

Under the specific commands of the Administrative Procedure Act, but disregarded and at least so far as the Interstate Commerce Commission is concerned emasculated, and the direct inferences of your Honorable Court in the *Pierce Auto Freight Lines* case, Section 1,009(e) Congress has said that "the reviewing Court . . . shall . . . hold unlawful and set aside agency findings and conclusions found to be . . . (3) in excess of statutory jurisdiction, authority or limitations, or of short of statutory right; (4) without observance of procedure required by law; . . .".

Complainants and all other parties opposing these many applications were highly prejudiced, as definitely shown, by the co-mingling of evidence in separate records. In doing this the Commission specifically acted (1) in excess of statutory authority; (2) in excess of statutory rights and (3) without observance of procedure required by law. That is a very substantial and highly important question in this proceeding.

The Government and the Interstate Commerce Commission in their motion to affirm omit to say anything about the question of the co-mingling of the evidence and as to the prejudicial consolidation they say that that procedure is well settled, citing *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572; *American Trucking Association* v. *United States*, 326 U. S. 77 and the *Pierce Auto Freight Lines* case. It is sufficient to say that the first two cases cited do not support their statement in any respect. That question was not raised in the first cited case and although raised in the *American Trucking Association* case it was

exactly in the reverse of this case and actually only one carrier was involved on applications covering a variety of routes. As we see it, the *Pierce Auto Freight Lines* case actually determines nothing except in relation to the fact that it was all right that the Commission chose to write one report rather than two. The respondents cannot find any comfort in that case. We are not complaining about the mere writing of one report, but we are very bitterly complaining about the prejudicial consolidation of so many applications for hearing and the unlawful and unreasonable co-mingling of the evidence from separate records when complainants and their counsel had no idea during the course of the various proceedings that the Commission would treat the testimony of all witnesses as though it had been given in connection with all applications and in all of the proceedings. Consequently we did not cross-examine with such circumstances in view.

Orders Are Not Supported by Substantial Evidence

EXHIBIT NUMBERED AS 50 IN INTERSTATE COMMERCE COMMISSION RECORD ALTHOUGH WHOLLY INADMISSIBLE, CONSTITUTES ONLY BASIS FOR ORDERS.

That administrative orders must be supported by substantial evidence is basic. The Trial Court, however, proceeded upon the theory that the Interstate Commerce Commission "is the final arbiter upon whether or not additional motor carrier services are required". This is not so to the extent that the law and the Courts require that Commission decisions must be based upon substantial evidence.

What constitutes substantial evidence where, in a case like this, the Commission is considering nineteen (19) applications on what is one record, at least the way the Commission considered them. Remembering the burden of proof as fixed by the Commission for any one applicant should the formula or burden of proof here be: Burden of

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proof multiplied by 19? If so what we have is burden of proof multiplied (but magnified by speculation) nineteen times. The result is that the determination has no basis in evidence and is devoid of reason.

To the contrary of the Trial Court's statement the Supreme Court in the *Universal Camera Corporation* case, 340 U. S. 474 said that since the adoption of the Administrative Procedure Act that "Congress has left no room for doubt as to the kind of scrutiny the Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof". The opinion makes it clear that it is the duty of Courts and that Congress has imposed upon Courts the responsibility for assuring that the Board keeps within "reasonable bounds". The Court must examine the record and determine for itself the question of substantiality.

This the Trial Court did not do for it was obsessed with the idea of administrative finality and absolutism as quotations from the Court's opinion show. We assert that when all of the evidence is examined, excluding the inadmissible Exhibit Number 50 of the Interstate Commerce Commission record that there is not only no substantial evidence, but there is no evidence which supports the Commission's findings. No witness testified to the inadequacy of existing service. Most of them admitted the adequacy of existing service. Practically none of the witnesses knew what service was presently available and none of the witnesses knew what equipment was available among the various existing carriers for the transportation of their commodities. Most of the witnesses did not even know that three of the applicants (defendants herein) already had authority to transport their commodities to four of the Rocky Mountain States. Of these three applicants who already had the authority, and had held the same for months prior to the hearings, had never transported a single shipment to any

of those states. None of the witnesses had any present need for any additional service. Practically none of the witnesses had any shipments at all moving to any of the western states. A great many of the witnesses said that there was no reason why the present carriers could not transport their shipments. Those shippers who had any shipments to move or who had had shipments in the past said that service of existing carriers was satisfactory. Most of the witnesses did not know of several existing carriers, including three of the applicants, who had authority to transport their shipments and when their attention was called to these various carriers said that there was no reason why they could not use them.

That is a very general statement, but it contains the facts from which it follows that the orders under attack are not supported by substantial evidence.

The Commission does not undertake to base any findings upon the testimony of shipper witnesses, but the order in context shows primarily and definitely that the orders were based upon what appears in the Commission's record as Exhibit Number 50. The Commission even admits that Exhibit No. 50 is highly speculative, leaving much to be desired. The Government and counsel for the Commission admit that the orders are in fact based entirely upon inadmissible Exhibit Number 50 as referred to. Because they state that Division 5 of the Commission (of course Division 5 had been stripped of all authority) held "that there was 'an immediate prospect' a 'large scale development program' for the Rocky Mountain Area, that such development would produce demands for transportation service 'of the highly specialized nature here considered' which would 'greatly exceed' the capacities of existing facilities, and that accordingly the 'present and future public convenience and necessity' require the proposed increased operations".

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In connection with our contention that the orders are without substantial support in the evidence we demand to know what witness who was sworn, took the stand and testified said that there was an immediate prospect of a large scale oil development program in the Rocky Mountain Area. We assert that no such witness appeared; that no such witness so testified. We also assert that no witness who was sworn and took the stand subject to cross-examination testified that even if there was what we commonly call an oil boom in the Rocky Mountain States that the need for transportation would "greatly exceed" the capacities of existing facilities. The record supports the contention.

No witness who was sworn and took the stand subject to cross-examination undertook to say that he was familiar with existing carriers and that was because those witnesses had had no need for any service and had not even tried to find out or in any way acquaint themselves with existing carriers. Those witnesses not only did not know the existing carriers, but they had no idea at all as to what facilities the existing carriers had and, therefore, of course knew nothing of the capacities of existing carriers to transport their shipments. There is nothing of that kind in the record by a live witness.

Now inasmuch as the Commission based its orders upon the findings as indicated, that is an immediate prospect of a large scale oil development program, it is only fair to determine where the Commission got that idea from the record. We assert that there is no place in the record from which the Commission could have gotten the idea and there is no support in the record for those findings by the Commission except Exhibit Number 50 as referred to.

If there was other support in the record for the Commission's findings we would say nothing about the erroneous admission of Exhibit Number 50 because it might be said

that the Commission gave little or no weight to Exhibit Number 50. The Commission's orders show quite the contrary, however, and that all weight was given to Exhibit Number 50. Exhibit Number 50 was erroneously admitted by the Examiner. It consisted of a lot of magazine articles and editorial comments by a large number of persons, known and unknown. No explanation was made, or even attempted, to explain the absence of the witnesses themselves so that they could actually take the witness stand to testify under oath and be subject to cross-examination. The Defendants who offered the exhibit in evidence did not undertake to in any respect qualify this magazine known as The Oil and Gas Journal for admission under any standard which the Courts have fixed for the admission of an instrument such as it was. Your complainants were thereby completely denied the right of cross-examination. This is a very valuable right inherent in Anglo Saxon Law. Since the orders under attack show in context that they were based on findings which came entirely and alone from that magazine its admission is error of such grievous character and so contravenes all existing law that the orders must be set aside.

When Division 5 made the findings referred to it said that it was relying upon the opinions of persons in positions to know. Division 5 was, therefore, first not exercising its experties and of course the Commission has no experties in the petroleum industry. Second, it was relying upon the magazine articles whose authors, known and unknown, were not called to testify and were not subject to cross-examination. As already stated, no live witness testified to anything of the kind. No live witness, that is one who was sworn, took the stand and was examined and cross-examined, could have testified to those things because of those witnesses practically all were ordinary transporta-

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tion traffic men, even those who testified on behalf of the oil companies. Not one of them could have qualified to testify about "extensive deposits of petroleum". Not one of them could qualify to testify about a thing in the world as to large scale development programs except to make the limited statement about what leases his company held and that is all that they would testify to. Each and every live witness qualified all of his statements by saying that any need for transportation would depend upon future developments and future developments were unknown. Many of the witnesses did not even hesitate to say that they were simply speculating. The Commission or at least Division 5 admits that all of the evidence is "highly speculative".

Nevertheless the Commission on this admittedly highly speculative evidence, and which so far as Division 5 findings are concerned came exclusively from magazine articles, authorized the grant of nineteen certificates. Had Exhibit No. 50 been excluded there would have been nothing in the record to support the findings of Division 5. Exhibit Number 50 should have been excluded and the Examiner committed highly prejudicial error in its admission. Although only admitted in connection with the record on the hearing of the group of twelve, nevertheless it was given full weight and consideration in connection with the group of six as well as in connection with the Newsom application. Section 10(e) Administrative Procedure Act, 5 U. S. C. A. 1009(e). *Interstate Commerce Commission* v. *L & N R R Co.*, 227 U. S. 88; *Consolidated Edson Company*, v. *N L R B*, 305 U. S. 197; *Southern Stevedoring Company* v. *Voris*, 190 Fed (2) 275.

Even if the authors, known and unknown, of those magazine articles had testified on the stand exactly in accordance with their writings complainants herein were still entitled on cross-examination to develop any additional or explana-

tory facts and to test the knowledge and competence of the witnesses as well as the basis of their opinions.

The Commission knew the rule but for some unknown reason and in their anxiety to grant these nineteen applications chose to ignore it. *Summerset Bus Company—Extension*, 43 MCC 543 (547); *Public Service Interstate Transportation Company—Bergen Turnpike* 43 MCC 599; Rocky *Mountain Lines, Inc.—Extension of Operations*, 27 MCC 57, *Calgary—Spokane Express, Common Carrier*, 29 MCC 746.

These magazine articles do not come under the rule permitting the use of market reports contained in newspapers or trade journals. Even market reports in trade journals are admissible only on the theory they are based on an authenticated source. *Virginia* v. *West Virginia*, 238 U. S. 202. It is perfectly clear that in no event would all those articles from this magazine have become admissible without the preliminary showing of authenticity. *Whalen* v. *Lynch*, 60 N Y 469; *Atlantic National Bank of Kerrach*, 242 Pac. 1009. The defendants who offered these magazine articles in evidence did not undertake to make the preliminary showing of authenticity.

The Government and Counsel for the Commission undertook to pass up these points with the mere statement that the Commission's report makes clear that little weight was given to Exhibit Number 50. Quite the contrary appears.

Stale Record

Another important question to be considered in this proceeding is the fact that the record in this case was stale. The facts are that these cases were heard in April and June of 1949. The report of Division 5, for whatever it was worth, was in 1951. The only order which the Commission made, under its reservation to make the initial decision,

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was on May 7, 1952, three years after the evidence was taken.

Your complainants insisted to the Interstate Commerce Commission before its order of May 7, 1952 that inasmuch as Division 5 in its writings on the applications had frankly admitted that the evidence was highly speculative, leaving much to be desired and inasmuch as Division 5 had predicated its suggestions to the Commission that all of the applications be granted upon its findings that an oil boom was impending, that after the passage of two or three years that the Commission ought to reopen the proceedings to determine whether or not any kind of an oil boom had developed. In other words, was there in fact "in immediate prospect" a "large scale development program" for the Rocky Mountain Area. After all Division 5 in its writings had, along with the authors of the magazine articles known and unknown, gazed into a crystal ball and made a mere forecast.

Would it not have been fair and reasonable after the passage of three years for the Commission to reopen the proceedings and determine whether or not the forecast as based on the admitted speculation had come true or was even about to come true. Surely two or three years would have determined whether the forecast was correct or incorrect.

Your complainant and other protestants insisted to the Commission that it should not act on the stale record and offered to produce evidence to show that there was no oil boom in the involved states. The Commission, however, in its anxiety about the situation, even though they had let three years elapse, refused to reopen the proceedings and find out what had happened in the three years to the prophesy which had been made. The Commission should have heard your complainants and other protestants and

intervenors evidence as to what had happened. That is the requirement of fairness as well as the holding of your Court in the *A. T. & S. F. R. Co.* case, 284 U. S. 241. Failure of the Commission to reopen was a clear abuse of discretion.

We know that the decision in the *A. T. S. F. R. Co.* case, *supra*, was promptly restricted to those special facts. *United States* v. *Northern P. R. Co.*, 288 U. S. 490. We assert, however, that the case at Bar presents such a clear abuse of discretion by the Commission as would sustain an exception to the limitation placed on the *A. T. & S. F. R. Co.* case and require that the Commission's order be set aside for failure to reopen. After all the cases merely hold that each case must be governed by its special facts. The special facts in this case require that the orders be set aside for failure of the Commission to reopen for further hearing.

Generally

The many questions presented are all important and substantial. We had little opportunity to present them to the Trial Court. On the record before us and in a case wholly unknown to the Trial Court we were allowed a fraction over one hour to present the case. The Trial Court remarked that "there are but two militant attacks." Untrue. We had no time to present our case and the Court was told that we would not have time in the allotted time but we were certainly not waiving any of the questions raised in the petition, whether we had time to present them or not. Just how little the Trial Court learned about the case is evidenced by the following statement:

> "Protestation was made at that time, charging that it was arbitrary, capricious, and prejudicial but *the Commission said*, 'It is the duty of the joint Boards and Examiners to develop such procedure in cases before the Commission as will complete the taking of

evidence with expedition and economy, without prejudice to the rights of the parties. The respective joint Board members were present at, and actively participated in the proceeding, and in the disposition of the applications assigned them. A very large portion of the evidence adduced equally to all of the applications. All parties were afforded the opportunity of a full direct or cross examination of the witnesses. There is no provision in the Interstate Commerce Commission Act which prohibits the hearing of related joint Board and Examiner cases upon a consolidated record. In the circumstances, it does not appear that any of the parties were, under the procedure adopted, deprived of any substantial rights in the proceedings.[1]' "

Frankly we cannot find anything in the records from which the quotation came and the Court does not tell us. In any event, the quotation is to the effect that joint board members were present and actively participated when there were never any joint board members present at these proceedings and none of the cases were joint board cases under the terms of the statute. It is said that the parties were afforded the opportunity of full direct or cross-examination of the witnesses. This is true only of the live witnesses who were sworn and took the stand, but even as to them complainants were denied the right of cross-examination so far as there was any thought at all that the evidence in all the records would be co-mingling and made applicable to all applicants. No one had any such thought or idea that that would be done. As to the many witnesses who testified in the inadmissible magazine articles, we were denied all right of cross-examination. In the circumstances it does clearly appear that complainants were irreparably injured and damaged under the procedure adopted, that in fact complainants were deprived of very substantial rights.

[1] We have just discovered that actually the Court is quoting from the *Mercer* case, 46 MCC 845.

Then the Court remarks that administrative bodies are not bound by strict rules of evidence which is true, but the Court goes on to say that the introduction of inadmissible evidence "will form no basis for reversal in the absence of the documents and comments of the Commission with respect to it . . ." It looks like the Trial Court thought that the inadmissible magazine articles were absent when in fact the document itself was in the Court room and in the record for the Court to consider as was also the comments of the Commission.

The questions presented are substantial, they are highly important and the Court should entertain jurisdiction and hear the appeal.

Respectfully submitted,

M. Ward Bailey,
T. S. Christopher,
Counsel for Appellants.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered January 2, 1953, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed a complaint seeking to set aside certain orders of the Interstate Commerce Commission. These orders authorized nineteen motor carriers specializing in the hauling of heavy oil field equipment to extend their operations from the Southwest into the Rocky Mountain area. Appellants are four motor carriers whose certificates of public convenience and necessity presently authorize them to transport such equipment to some of the same areas for which the additional carriers have been certificated. This appeal was allowed on February 11, 1953, and the appeal papers were served on appellees on February 13, 1953.

In 1948 a number of motor carriers operating in the Southwest in anticipation of an oil boom in the Rocky Mountain area, filed applications for extension of their certificate authority to haul oil field equipment into that area. Three successive separate hearings were held: a consolidated hearing on twelve applications, another consolidated hearing on six applications, and a separate hearing on a

single application.[1] The examiner before whom these applications were heard had not been appointed pursuant to Section 11 of the Administrative Procedure Act. Appellants participated in the three hearings and opposed the applications, but did not challenge the examiner's qualifications, although they had ample opportunity to do so.

The examiner filed three separate reports, recommending that all the applications be denied. The applicants filed exceptions to these reports and appellants filed replies in which several of them praised the examiner's conduct of the hearings and his evaluation of the evidence.

On June 11, 1951, Division 5 of the Commission rejected the examiner's recommendations, and granted all of the applications. Division 5 held that there was "in immediate prospect" a "large-scale development program" for the Rocky Mountain area, that such development would produce demands for transportation service "of the highly specialized nature here considered" which would "greatly exceed" the capacities of existing facilities, and that accordingly the "present and future public convenience and necessity" required the proposed increased operations. Division 5 issued one consolidated report covering the eighteen applications that had been heard at the two consolidated hearings, and another report covering the single application that had been heard separately.

Appellants filed motions with the Commission

---

[1] The hearings were held between April 1949 and June 1949 in Dallas and Houston, Texas, and in Denver, Colorado.

for rehearing and reconsideration. In these motions they raised, for the first time in the proceedings, the objection that the examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act. On May 7, 1952, the Commission unanimously denied the motions.

Appellants then filed the instant suit in the district court to set aside the Commission's orders. After hearing argument the district court (Hutchinson, Circuit Judge, and Atwell and Davidson, District Judges) unanimously affirmed the Commission's orders. 108 F. Supp. 928.

Appellants' principal contention is that their objection that the examiner had not been appointed pursuant to the Administrative Procedure Act, was seasonably made in their petition for rehearing. We believe, however, that the decision of the Court in *United States* v. *Tucker Truck Lines*, 344 U. S. 33, requires rejection of this contention. Although the precise issue was not specifically decided in the *Tucker* case, we submit that the Court's opinion indicates that in proceedings before the Interstate Commerce Commission objection to the examiner's qualification must be made during the course of the hearings.

In the *Tucker* case the Court held that an objection to the qualifications of an examiner came too late when made for the first time in the district court. The Court held that since the Commission's failure to appoint a qualified examiner was not a jurisdictional defect, the Commission's order was not to be set aside unless a "timely objection" had

been made. P. 38. The Court's opinion indicates that by "timely objection" it meant one "made at the time appropriate under its [the agency's] practice," and that under the "established practice" of the Interstate Commerce Commission such an objection was not timely unless made "before the examiner." P. 37.[2] The Court stated that a defect in the examiner's appointment was an "irregularity" which would invalidate a resulting Commission order if the Commission had overruled an appropriate objection "*made during the hearings*" (P. 38; emphasis added). The Court further pointed out, in distinguishing *Riss & Co.* v. *United States*, 341 U. S. 907, that in the *Riss* case the examiner's qualifications had been challenged "*as it should have been*, before the examiner at the hearings * * *" (P. 36; emphasis added).

The rationale of the *Tucker* case is equally applicable to the case at bar. There is no suggestion here that the examiner exhibited "bias, favoritism or unfairness" (P. 35); on the contrary, he decided in appellants' favor, and they subsequently praised his conduct of the proceedings. Nor did the Commission or the examiner occupy an adversary role in the proceedings; their sole function was "to decide justly between contestants in an adversary proceeding" (P. 36). Clearly, the objection to the examiner's qualifications in the instant case was "an afterthought, brought forward

[2] The Court noted that it was the Commissioner's "policy" to refuse rehearings in cases where the objection had not been made before the examiner. P. 37, note 7.

at the last possible moment to undo the administrative proceedings without consideration of the merits," which could "prevail only from technical compulsion irrespective of considerations of practical justice." *Ibid.*[3]

We submit that by its decision in the *Tucker* case this Court plainly intended to bar judicial consideration of objections to the qualifications of hearing examiners unless they had been made during the course of the hearings.

Appellants also argue that the Commission erred in (1) consolidating the applications for hearing, and (2) issuing a single report covering all the applications thus consolidated. Neither contention is sound. The power of administrative agencies to consolidate for hearing cases which involve a common subject matter is well settled. Cf. *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572, 576-577, where the Court approved the consolidation of 45 route applications filed by 25 airlines into a single area proceeding. Since all of the applications in the instant case involved the extension of existing operating authority into the same area, consolidation clearly was appropriate. Cf. *American Trucking Associations* v. *United States*, 326 U. S. 77, 83. Similarly, it was within the Commission's discretion to dispose of the consolidated applications in a single report. Since the applications were all "closely related" and appellants par-

[3] Appellants do not "claim to have been mislead or in any way hampered in ascertaining the facts about the examiner's appointment." P. 35.

ticipated in both of the consolidated hearings, appellants cannot complain that the Commission "chose to write one report rather than two" or eighteen. *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 523.

Appellants' other arguments are likewise without merit. They urge that the examiner erred in admitting into evidence excerpts from the *Oil and Gas Journal* dealing with prospective oil production in the Rocky Mountain area. As the Commission's report makes clear, however, little weight was given to this evidence. Appellants also contend that a rehearing should have been granted because the record before the Commission was stale. As this Court has repeatedly recognized, however, the grant or denial of a rehearing for that reason is within the Commission's discretion. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 515-518, and cases there cited; *United States* v. *Pierce Auto Freight Lines*, *supra*.

Finally, appellants challenge the Commission's finding that the public convenience and necessity would be served by granting the applications and permitting the service to be inaugurated forthwith, instead of "waiting until the transportation situation becomes critical before authorizing additional service." Section 207 of the Act, however, authorizes the granting of certificates if required "by the present or *future*" public convenience and necessity (emphasis added). The determination of whether "additional motor carrier service would serve public convenience and necessity," and

whether "the public interest requires that future shipping needs be assured rather than left uncertain," are matters peculiarly within the Commission's expert discretion. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. And, in exercising that discretion, the Commission is required to make forecasts as to future transportation requirements. *United States* v. *Detroit Navigation Co., supra.* The district court found, after a careful review of the Commission's detailed report and the extensive record, that there was "ample testimony" to support the Commission's findings. This conclusion is, we submit, plainly correct. Appellants' attack on the Commission's finding of public convenience and necessity presents no question warranting further review by this Court.

CONCLUSION

For the foregoing reasons, we submit that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

FEBRUARY 1953.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, DOING BUSINESS AS WALES TRUCKING COMPANY, L. C. JONES TRUCKING COMPANY, INCORPORATED, PARK-HILL TRUCK COMPANY, AND H. J. JEFFRIES TRUCK LINE, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT OF NEWSOM TRUCK LINE, INCORPORATED, APPELLEE, AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

R. E. KIDWELL,
Counsel for Newsom Truck Line, Incorporated, Appellee.

JO E. SHAW,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

L. E. (PRINCE) WALES, DBA WALES TRUCKING COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

STATEMENT OF NEWSOM TRUCK LINE, INCORPORATED, APPELLEE, AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellee (Respondent in the District Court), Newsom Truck Line, Inc., respectfully submits herein its statement in opposition to Appellants' (Complainants in the District Court), jurisdictional statement and its motion to dismiss the appeal, or in the alternative, to affirm the judgment of the District Court for the reason that Appellants' jurisdictional statement does not present any substantial questions.

Questions Presented

The questions presented by Appellants which this Appellee asserts are not of a substantial nature and which have been answered unfavorably to Appellants by prior decisions of the Supreme Court of the United States, are: First, whether the order of the Interstate Commerce Com-

mission granting a certificate of public convenience and necessity to Appellee is void because the hearings before the Commission were not held by an examiner appointed as provided in the Administrative Procedure Act; Second, whether, if Appellee's application before the Interstate Commerce Commission was consolidated with certain of the related applications for hearing and disposition (which consolidation is denied by Appellee for the reason that its application was heard on a separate record and disposed of in a separate order). Appellants were thereby deprived of a full, fair and impartial hearing; Third, whether the findings and conclusions of the Interstate Commerce Commission with respect to Appellee are reasonably supported by reliable and substantial evidence as applied to the whole record; and Fourth, whether the refusal of the Interstate Commerce Commission to grant rehearing of the proceedings constituted a proper exercise of its discretion.

I

The Question Whether the Order of the Interstate Commerce Commission Granting a Certificate of Public Convenience and Necessity to Appellee Is Void Because the Hearings Before the Commission Were Not Held by an Examiner Appointed as Provided in the Administrative Procedure Act Has Been Decided Adversely to Appellants by the Supreme Court of the United States in United States of America et al. v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33.

Appellants direct certain assignments of error to the refusal of the District Court to set aside the order of the Interstate Commerce Commission because the examiner who presided at the hearings on Appellee's application had not been appointed in conformity with the Administrative Procedure Act.

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The record discloses that Appellants participated in the hearings before the examiner at Houston, Texas, and Denver, Colorado, without at any time objecting to the qualifications of the examiner, and raised the question of his qualifications for the first time in their petition for reconsideration. As a matter of fact, the examiner recommended that Appellee's application be denied, and recommended the entering of an order favorable to Appellants, and in reply to the exceptions filed by the Appellee to the report and recommended order of the examiner, certain of the Appellants in their reply to such exceptions, which reply is dated September 21, 1950, urged that Appellee's exceptions be denied and that the order recommended by the examiner be sustained.

In this connection, the Supreme Court on the specific point here involved, in *United States of America, Et Al.*, vs. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, held as follows:

> "The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made *during the hearings*. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." (italics ours.)

In view of the fact that Appellants sat idly by for about two years hoping that the Interstate Commerce Commission would sustain the denial recommended by the examiner, clearly constituted a waiver by Appellants of any objection to the qualifications of the hearing examiner which they might have otherwise properly asserted.

This conclusion is clearly in accord with the holding in the *Tucker Case* wherein the Court further held that fairness requires that the courts should not set aside adminis-

trative decisions unless the administrative body "*has erred against objection made at the time appropriate under its practice.*" (italics ours.)

Appellee submits that no substantial question regarding the examiner's qualifications has been presented.

II

The Question of the Consolidation of Certain of the Applications Does Not Involve Appellee Because Its Application Was Heard Separately and Disposed of in a Separate Report.

The application of Appellee, Newsom Truck Line, Inc., was heard separately and disposed of in a separate order by the Interstate Commerce Commission. In this connection the District Court in its opinion found that: "The Respondent, Newsom Truck Line application was heard separately. Testimony in the *Newsom case* was taken at Houston on May 2, 1949, and concluded at Denver on June 28, 1949." The mere fact that the separate report of Division 5 of the Commission in the *Newsom Case* bore the same date as the report dealing with the other applications which were consolidated, June 11, 1951, is certainly immaterial. In this connection, the District Court in referring to the report relating to the consolidated applications of the other eighteen applicants and the report dealing with the Newsom application had this to say: "This report was dated June 11, 1951. On the same date, the Newsom Truck Line was also granted a certificate."

It is clear that the Newson application was separately heard, treated, considered and dealt with by the Commission, and was not consolidated with the applications of the other eighteen appellees.

However, if by the most strained construction, it could be said that the Newsom application was consolidated with

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the others, the procedure followed by the Commission was in keeping with accepted practice, and Appellant's complaint with respect thereto is without merit in view of the decision by the Supreme Court in *United States, et al.* vs. *Pierce Auto Freight Lines, et al.*, 327 U. S. 515, and other decisions by the Court applying the same reasoning.

III

The Findings and Conclusions of the Interstate Commerce Commission Are Reasonably Supported by Reliable and Substantial Evidence as Applied to the Whole Record.

The question here presented by Appellants is not substantial. Extensive hearings were conducted on the application in question, both in Houston, Texas, and in Denver, Colorado. The District Court found that:

> "Voluminous testimony, covering thousands of pages, was introduced in the hearing before us, and such testimony discloses that there is ample testimony to support the findings of the Commission in overruling the recommendation of the Examiner and in granting the certificates sought. Such testimony included persons entirely familiar with the incoming oil fields in the mentioned states, with the exception of one or two of such states, and with the vast number of trucks that are required to carry heavy oil drilling and oil developing machinery. Also covering leases that had been made in these particular territories, which, of course, carry expiration dates and necessity for development without delay."

In this connection, the complaint of Appellants amounts to a request that the findings and conclusions of the Interstate Commerce Commission and of the District Court be held for naught and that the judgment of the Supreme Court be substituted therefor.

It is true that some of the evidence before the Commission concerned itself with future needs, but in *United States* vs. *Detroit and Cleveland Navigation Company*, 326 U. S. 236, 241, the Supreme Court said:

> "Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future, nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide."

Appellee contends that the question here discussed is completely lacking in substance.

IV

The Refusal of the Interstate Commerce Commission to Grant Rehearing Is Clearly Within the Discretion of That Body under the Circumstances of Each Case.

Appellants' complaint that the Commission refused rehearing presents no substantial question for the reason that rehearing is not granted as a matter of right, but requests therefor are addressed to the discretion of the Commission. There is no abuse of such discretion shown where the Commission refuses rehearing merely because there is a gap in time between the date when the hearing is closed and the order of the Commission is entered. Such a gap is usually present, and necessarily so, under general administrative procedure, and in numerous decisions by the Supreme Court of the United States it has been held that only a showing of the clearest abuse of discretion would justify the setting aside of an order for refusal to grant rehearing. *United States, et al.* vs. *Pierce Auto Freight Lines, Inc., et al.*, 327 U. S. 515.

There has been no showing that the Commission abused its discretion in this regard, and Appellants' complaint lacks substance.

Conclusion

Wherefore, Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the decree entered below.

Respectfully submitted,

R. E. KIDWELL,
Counsel for Appellee.

JO E. SHAW,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, DOING BUSINESS AS WALES TRUCKING COMPANY; L. C. JONES TRUCKING COMPANY, INCORPORATED, PARKHILL TRUCK COMPANY, AND H. J. JEFFRIES TRUCK LINE,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT OF HEAVY HAULERS, INCORPORATED, ET AL., APPELLEES, AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

REAGAN SAYERS,
Counsel for Tex-O-Kan Transportation Company, Incorporated;
ROLLO E. KIDWELL,
Counsel for Heavy Haulers, Incorporated, W. C. Case and H. L. Case, Doing Business as Case Brothers, C. J. Simpson, John B. Barbour Trucking Company and J. H. Marks Trucking Company, Incorporated.

STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES, HEAVY HAULERS, INC., ET AL.

Appellees Heavy Haulers, Inc., W. C. Case and H. L. Case d. b. a. Case Brothers, C. J. Simpson, John B. Barbour Trucking Company, J. H. Marks Trucking Co., Inc., and Tex-O-Kan Transportation Company, Inc., adopt as their own and on their behalf Appellees' Statement as to Jurisdiction heretofore filed by appellees E. L. Farmer & Company, et al., in this cause on February 23, 1953, in opposition to appellants' jurisdictional statement; and

Move to dismiss the appeal, or, in the alternative, to affirm the judgment of the District Court on the grounds that appellants' jurisdictional statement does not present any grounds upon which it is contended that the questions involved are substantial, and the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

The argument which these appellees desire to present in support of this motion is identical with that presented in the Appellees' Statement as to Jurisdiction and Motion to Affirm or Dismiss, above referred to, filed herein by E. L. Farmer & Company, and in the interest of avoiding repetition in the record, these appellees adopt as their own and in their behalf the statements and arguments made therein in support of the motion. The statements in such Statement and Motion are applicable equally on behalf of these appellees, with the further statements that the applications in this group of cases were assigned for hearing in Dallas on April 27, 1949, rather than on April 18, 1949, and the protestants' (including appellants here) evidence is identical in the two groups of hearings, the protestants' evidence in the Farmer & Company group of cases having been

incorporated into the other group of cases by stipulation at the Denver hearings.

WHEREFORE, the undersigned appellees move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the District Court dismissing the complaint.

Respectfully submitted,

REAGAN SAYERS,
Counsel for Tex-O-Kan Transportation Company, Inc.;

ROLLO E. KIDWELL,
Counsel for Heavy Haulers, Inc., W. C. Case and H. L. Case, d. b. a., Case Brothers, C. J. Simpson, John B. Barbour Trucking Company, and J. H. Marks Trucking Co., Inc.

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II. The question of the practice and procedure followed by the Commission in consolidating the related applications and disposing of them in a single report has been plainly foreclosed against appellants by such decisions of the Supreme Court as *U. S., et al.*, v. *Pierce Auto Freight Lines, et al.*, 327 U.S. 515, and other cases hereafter cited 8

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, D/B/A WALES TRUCKING COMPANY, ET AL.,

vs. *Complainants,*

UNITED STATES OF AMERICA, ET AL.,
Defendants

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees E. L. Farmer & Company, Rogers Truck Line, O. H. McAlister, Alton Leander McAlister, Hunsaker Trucking Contractor, Inc., Eagle Trucking Company, B. F. Walker, Inc., Joe D. Hughes, Inc., C. L. Bell, D. E. McAlister, T. E. Mercer Teaming and Trucking Contractor and Younger Bros.—J. M. English Truck Lines, Inc., submit herewith their statement in opposition to appellants' jurisdictional statement. Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the District Court on the grounds that appellants' jurisdictional statement does not present any grounds upon which it is contended that the questions in-

volved are substantial and that as a matter of fact the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellees assert that there has been no showing and no attempt to show by appellants that the questions involved are substantial. Appellees further assert that it is apparent that the questions involved are so wanting in substance as not to need further argument and have been so plainly foreclosed by the decisions of the Supreme Court as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

Questions Presented

While appellants' jurisdictional statement fails to specify what questions are involved or upon what grounds they are considered substantial, the nature of appellants' assignments of error, disregarding the purely argumentative matter contained therein, indicates that there are four possible questions presented. The first question is whether the fact that the hearings before the Interstate Commerce Commission were not presided over by an examiner appointed as provided in the Administrative Procedure Act renders the order of the Commission predicated thereon void, even in the absence of timely objection. The second question is whether the practice and procedure followed by the Commission in consolidating certain of the related applications for hearing and in disposing of the 18 related applications in a single report and order deprived appellants of a full, fair and impartial hearing. The third question is whether the findings and conclusions of the Commission are supported by substantial evidence. The fourth question is whether the action of the Commission in refus-

ing to reopen the proceedings for rehearing was a proper exercise of the discretion of the Commission.

It is readily apparent that the questions involved are not substantial and that the same or essentially similar questions have been considered by the Surpeme Court in recent decisions and numerous previous decisions, and have been so plainly foreclosed by such decisions as to make further argument unnecessary.

I

The Question of Whether, in the Absence of Timely Objection, the Fact That the Examiner Presiding Over the Hearings Was Not Appointed as Provided in the Administrative Procedure Act Is Such a Defect as Would Invalidate and Render Null and Void the Resulting Order of the Commission Is Plainly Foreclosed Against Appellants by the Decision of the Supreme Court in United States of America, et al., v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33.

Appellants'[1] first and second assignments of error contend that the District Court erred in refusing to set aside and vacate the orders of the Interstate Commerce Commission because the examiner who presided over the hearings had not at the time been appointed and qualified pursuant to the Administrative Procedure Act.

These assignments thus raise the question of whether or not the matter of the examiner's appointment is such a defect as would invalidate and render null and void the resulting orders of the Commission based on said hearings, even in the absence of timely objection. Complainants in this proceeding did not seasonably object to the examiner's appointment or qualifications at or during the hearings.

[1] Also referred to herein as complainants.

and it was not until approximately two years after the hearings were closed that complainants, in a petition for reconsideration, first raised the question.

The recent decision of the Supreme Court in *United States of America, et al.*, v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (hereafter referred to as the *Tucker* case), decided November 10, 1952, determines this issue squarely against the contentions of complainants. On the specific question here involved the Court held as follows:

> "The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made *during the hearings*.[2] But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity."

In view of this decision in the *Tucker* case, and the facts (which will be hereafter briefly reviewed) existing in the instant proceeding, it is clear that the alleged defect in the appointment of the examiner was a mere irregularity which in no way deprives the Commission of power or jurisdiction or invalidates the resulting orders, and does not present any substantial question herein for decision.

The Administrative Procedure Act was passed by Congress on June 11, 1946, approximately 2½ years prior to the filing of these applications in the latter part of 1948. Notice of the filing of the applications was at that time forwarded by the applicants to complainants and/or their predecessors. The Commission assigned the applications for hearing at Dallas commencing April 18, 1949, before one of its examiners, Clarence E. Simmons, and due notice

[2] Italicizing here and throughout this brief is ours unless otherwise indicated.

of this assignment was forwarded by the Commission to complainants. These complainants or their predecessors, through their attorneys and representatives, took a very active part in the hearing at Dallas and later at Denver, but made no objection whatsoever to the qualifications of the presiding examiner and made no request of any kind that the applications be heard before an examiner appointed as provided in the Administrative Procedure Act.

After the hearing was closed, complainants and other parties were given the opportunity of filing briefs before the examiner, and they availed themselves of this opportunity and filed voluminous briefs, but no objection or mention of the appointment of the hearing examiner was made. Upon the issuance of the examiner's recommended report and order, applicants (appellees herein) filed exceptions thereto, and in their replies complainants commended the examiner and urged the Commission to accept and affirm his report and recommended order. No objections were raised by complainants in these instruments as to the qualifications of the examiner. It was not until after Division 5 of the Commission had issued its report and order of June 11, 1951, subsequently affirmed by the entire Commission, that complainants attempted to raise the question of the examiner's appointment.

Complainants sat silent on the examiner question throughout these whole proceedings and took the chance of a favorable decision on the record as made. This constitutes a fatal lack of diligence and in view of the decision in the *Tucker Case* complainants cannot raise this question now. Otherwise, complainants would have a double-barrelled weapon in opposing the applications; first, they could sit idly by while the proceedings were being processed and gamble on a favorable decision of the Commission, in which case they would have no need to raise the hearing examiner question but would indeed affirm the validity of the

proceeding; second, complainants could wait and see how they fared before the Commission, as they did in this proceeding, and then, after the Commission had issued a report and order unfavorable to complainants, attempt to bring forth the examiner question for the first time.

The complacency of the appellees in this respect obviously stems from the fact that they were not actually prejudiced by the conduct or manner of appointment of the examiner. As a matter of fact, the examiner's report was favorable to complainants, and complainants received the benefit of his recommendations in their favor, thus placing on appellees the task of showing that the examiner erred in his findings and conclusions, and thereafter complainants urged upon the Commission that it should have affirmed the recommended report and order of the examiner. Complainants thus contended practically throughout the proceeding that the examiner was qualified and that his report should be accepted as the order of the Commission, but not having prevailed in this position complainants belatedly reversed themselves and attempted to attack the validity of the hearing due to the technicality of the appointment of the examiner.

This complacency of the complainants in raising the question of the appointment of the examiner and the lack of prejudice to them is strikingly similar to that exhibited in the *Tucker Case*, and the statement of the Supreme Court there is equally applicable in this proceeding:

> "The apparent reason for complacency was that it (appellee) was not actually prejudiced by the conduct or manner of appointment of the examiner. There is no suggestion that he exhibited bias, favoritism or unfairness. Nor is there ground for assuming it from the relationships in the proceeding. He did not act and was not expected to act both as prosecutor and judge. The Commission, which appointed him, did not insti-

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> tute or become a party in interest to the proceeding. Neither it nor its examiner had any function except to decide justly between contestants in an adversary proceeding. The issue is clearly an after thought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice."

In the *Tucker Case* the question of the examiner's appointment was raised for the first time in the District Court and was not raised before the Commission. The decision in that case holds, however, that the objection to the hearing examiner must be timely and seasonably made, and in this connection the Court stated:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that Courts should not topple over administrative decisions unless the Administrative body not only has erred but has erred against *objection made at the time appropriate under its practice.*"

For the alleged defect in the examiner's appointment to be available to complainants in the instant proceeding, they would have had to make timely and appropriate objection, which means at or during the hearing and not two years thereafter, or in the language of the Court in the *Tucker Case*, ". . . the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings."

It is therefore submitted that no substantial question is here presented and that this issue has been plainly foreclosed by the decision in the *Tucker Case*.

II

The Question of the Practice and Procedure Followed by the Commission in Consolidating the Related Applications and Disposing of Them in a Single Report Has Been Plainly Foreclosed Against Appellants by Such Decisions of the Supreme Court as U. S., et al., v. Pierce Auto Freight Lines, et al., 327 U. S. 515, and Other Cases Hereafter Cited.

The applications of these appellees were consolidated for hearing and heard on a joint record, and subsequently disposed of in a single report by the Commission together with the applications of six of the other motor carrier appellees, whose applications had also been consolidated for hearing and were heard at or immediately following the time of the hearings on these applications. Appellants assign as error the action of the District Court in upholding this procedure followed by the Commission, but appellees respectfully submit that the Commission simply followed well established and proper administrative procedures affording substantial justice to all parties.

Practically identical procedural questions were involved in *United States, et al.* v. *Pierce Auto Freight Lines, et al.*, 327 U. S. 515, for although the two applications there involved were not technically consolidated, the hearings were substantially coordinated and the Interstate Commerce Commission disposed of both applications in a single report. The Supreme Court held that obviously it was not sufficient ground for suspending the Commission's order that it chose to write one report rather than two, especially in

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matters so closely related, if the findings and evidence were sufficient to sustain the action taken, and specifically pointed out that it is not uncommon judicial practice to follow this course. The court pointed out that all of the parties were parties to both proceedings, were represented at all of the hearings which were conducted at substantially the same times and places, were given full opportunity to present all evidence they considered pertinent, to cross-examine witnesses and otherwise protect their interests; that large portions of the evidence applied as much to one application as to another, particularly the proofs relating to traffic conditions, shipper demands, the need for faster service and other items, and that under the circumstances it was difficult to see how the complaining parties could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in the two proceedings. These considerations are equally applicable to the proceeding at bar, as is the following statement by the Court:

> "In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to legal version of the scriptural injunction against letting one's right hand know what one's left may be doing."

In the proceedings here involved, all the applicants before the Commission were oil field haulers, all domiciled in Texas, all engaged in general oil field transportation operations in the south and southwest. All the applications involved extension of operating authority to and between

points in the same or similar territory in the Rocky Mountain area. All the applications sought authority to transport the same commodities and it is obvious that the same evidence applied to and was material to all. The applications were all filed at or during the same period of time and consequently common parties, common issues, and common or related questions of fact and law were involved and were before the Commission at the same time.

It is apparent that the Commission, in determining public convenience and necessity and applying the national transportation policy, must necessarily determine the transportation conditions and transportation needs existing in the territory to be served, and then through the application of its expert judgment and experience in and knowledge of interstate transportation matters determine whether or not additional motor carrier service is required. Public transportation need is a fact and not something that can belong to any applicant or group of applicants, and is established and determined by proof of transportation conditions existing in the territory to be served. Clearly the Commission, with the involved applications before it, could not close its eyes to the fact that similar applications involving the same territory, same commodities and the same issues were also before it at the same time.

Under these circumstances, it is clear that large portions of the evidence before the Commission applied as much to one application or group of applications as to another, that the procedure followed was proper administrative practice on the part of the Commission and assisted it in determining the public transportation needs and conditions existing in the territory involved, and that having determined the public need for additional transportation service the Commission correctly determined—based on its expert judgment and knowledge of transportation mat-

ters,—that this public need would best be served by granting the applications of the defendants and authorizing them to perform a transportation service from Texas into the Rocky Mountain States and return similar to the transportation service now being performed by them for the petroleum industry in the south and southwest.

Under such circumstances the consolidation of these applications for hearing and disposition thereof in a single report was clearly proper administrative procedure, and there has been no showing of prejudice to complainants. Complainants were parties to all proceedings, were represented at all the hearings, were given the opportunity of full direct and cross-examination of all witnesses and were given full opportunity to present all evidence they considered pertinent and otherwise protect their interests. Clearly they were not deprived of any substantial rights.

As pointed out in the instant opinion of the District Court, the practice of consolidating similar proceedings has been approved in such cases as *Central Transfer Company* v. *Term RR. Company*, 288 U. S. 469; *Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Meeker* v. *Lehigh Valley*, 236 U. S. 434, and *U. S., et al.* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515. Also as there pointed out by the District Court, such action eliminates costly duplication in the presentation of evidence and affords opportunity of more expeditious disposition of the proceeding.

Appellees therefore assert that this question is so unsubstantial as not to need further argument and has been plainly foreclosed against appellants' contentions.

III

The Findings and Conclusions of the Commission Are Supported by Substantial Evidence and the Granting of the Certificates Is a Reasonable and Valid Exercise of the Judgment and Authority of the Commission, and No Substantial Question Is Presented in Connection Therewith.

We are unable to see wherein there is any substantial question presented in connection with the evidence in support of the Commission's findings and conclusions or the authority and discretion of the Commission to issue the involved certificates in the premises. The principles governing proceedings of this type are clear and well established, and the somewhat voluminous record before the Commission, considered as a whole, clearly contains reliable, probative and substantial evidence in support of the Commission's findings.

Extensive hearings were conducted on the applications, and at the hearings representatives of a large number of oil companies, refining companies, oil well drilling contractors, pipe line contractors, and various oil field equipment manufacturing and supply companies testified concerning their experiences and transportation difficulties in their past and present operations in the Rocky Mountain states, and their expanding future operations in the area. In this connection, the District Court in its opinion stated:

> "Voluminous testimony, covering thousands of pages, was introduced in the hearing before us, and such testimony discloses that there is ample testimony to support the findings of the Commission in overruling the recommendation of the Examiner, and in granting the certificates sought. Such testimony included persons entirely familiar with the incoming oil fields in the mentioned states, with the exception of one or two of such states, and with the vast number of trucks that

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> are required to carry heavy oil drilling and oil developing machinery. Also covering leases that had been made in these particular territories, which, of course, carry expiration dates and necessity for development without delay."

Further on the Court said:

> "... No one can study the great oil sands which come down from Montana all through the states involved here, into Colorado, and on down through Texas, without realizing that the development which is now taking place there, and which is being richly rewarded by paying wells, can be expected to be satisfied and sufficiently supplied by motor carriers as now licensed. That very question was a controversial one and it has been settled by the satisfactory amount of evidence which was considered by the Commission."

And further:

> "The testimony showing the trend of new development and exploration in the oil fields, with their extensive acreage and outstanding leases, and large-scale exploratory operations, together with the great production, furnishes a substantial foundation for the judgment of the Commission. United States v. Carolina Freight Carriers, 315 U. S. 475; Warehouse Co. v. United States, 283 U. S. 501; McLean Trucking Co., Inc. et al v. United States, et al, 321 U. S. 67; Capitol Transit Co. v. United States et al 97 F. (s) 614; Lang Transportation Corp. et al v. United States, et al, 75 F. (s) 918; Interstate Commerce Commission, et al v. Parker, et al, 326 U. S. 60."

Part of the evidence necessarily relates to the future but it must be remembered that the statute (Title 49, U. S. Code, Section 307) authorizes the Commission to issue a certificate on the basis of not only the present, but also the future, public convenience and necessity. In this connec-

tion, in *United States* vs. *Detroit and Cleveland Navigation Co.*, 326 U. S. 236, 241, the Supreme Court said:

> "* * * The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission v. Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co. v. United States*, 283 U. S. 35, 42; *Alton R. Co. v. United States*, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. *It may be that the public interest requires that future shipping needs be assured rather than left uncertain.* The Commission has the discretion so to decide. It went no further here."

It seems apparent that no legal principles are here in dispute, but complainants simply disagree with the Commission and the District Court concerning the substantiality of the evidence supporting the action of the Commission. Both the Commission and the District Court have carefully reviewed the voluminous evidence and have arrived at conclusions contrary to the contentions of complainants.

Appellees therefore respectively assert that this question is so wanting in substance as not to need further argu-

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ment and has been foreclosed against appellants' contentions.

IV

The Action of the Commission in Denying Complainants' Petition for Rehearing Presents No Substantial Question and Has Been Plainly Foreclosed Against Appellants.

It is well settled that rehearings are not matters of right, but are pleas addressed to the discretion of the agency or body making the order. In the instant proceeding, particularly in view of the full and extensive hearings and the large record involved, the Commission acted well within its discretion in denying complainants' request for rehearing.

In *ICC et al., vs. City of Jersey City, et al.*, 322 U. S. 503, the Court stated at page 514:

> "One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion.

> And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

Prior to the decision of these applications by Division 5 of the Commission, complainants did not suggest that a further hearing should be held to bring the record up-to-date, but instead they relied on the record as made and urged that the Commission decide the applications in accord with the examiner's recommendations on this record. Under somewhat similar circumstances the Supreme Court in *United States* v. *Northern Pacific Railway Company*, 288 U. S. 490, 494, stated:

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

As stated by the Supreme Court in *United States et al.*, v. *Pierce Auto Freight Lines, Inc., et al.*, 327 U. S. 515, it has been held consistently that rehearings before administrative bodies are addressed to their own discretion, and, "Only a showing of the clearest abuse of discretion could sustain an exception to that rule."

In this proceeding the Commission acted well within its discretion and did not err in overruling complainants' petition for rehearing, and the question thus presented in this respect is so wanting in substance as not to need further

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argument and has plainly been foreclosed against appellants' contentions.

Conclusion

WHEREFORE, appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument and appellees respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the decree dismissing the complaint entered below.

Respectfully submitted,

RALPH W. CURRIE,
EWELL H. MUSE, JR.,
MORGAN NESBITT,
Counsel for Named Appellees.

MAY 18, 1953.

Per Curiam Decision.

No. 723. WALES, DOING BUSINESS AS WALES TRUCKING CO., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *United States* v. *Tucker Truck Lines*, 344 U. S. 33; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241. *T. S. Christopher* for appellants. *Solicitor General Cummings* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *R. E. Kidwell* for the Newsom Truck Line et al.; *Reagan Sayers* for Tex-O-Kan Transportation Co.; and *Ewell H. Muse, Jr.* for E. L. Farmer & Co. et al., appellees. Reported below: 108 F. Supp. 928.